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in respect to the wife's *legal* separate estate under chapter 103 of the Code, there may be a *personal* judgment or decree against her, and the same may be enforced against her, and not only against "any separate estate she *has*" [at the time the contract was made or liability incurred], but also against "*any she may subsequently acquire, in the same manner as if she were unmarried.*" Sec. 2289.

It has been a rule that a contract or engagement of a married woman, in order to make her separate estate, whether statutory or equitable, liable under it, must be made in respect to that estate or on the faith and credit thereof. She must have *intended* to make it liable, and the difficulty with the courts has been to determine whether such intention existed or not, and upon this question there has been no little conflict of decision. The difficulty is now, for the most part, removed in Virginia. If the wife has any statutory separate estate whatever, and makes a contract on her own account (not as agent for her husband), though she is silent as to the intention to charge the estate, she is *conclusively presumed* to have made the contract on the credit of that estate, and, if she has any equitable separate estate at the time, she is presumed to have *intended* to charge such equitable estate also, to the extent of her powers over it, "*unless the contrary intention is expressed in the contract.*" Sec. 2295.

It must not be overlooked that the term "separate estate" used in section 2289 and, indeed, in all the sections preceding section 2294 of the same chapter, does not embrace *equitable* separate estates. These latter estates may be created now as heretofore and are not affected by any provisions of Chapter 103 of the Code, except by sec. 2296 and by the rule of construction already adverted to, where at the time the contract is made there is some *existing* statutory separate estate and *also* an equitable separate estate which the wife has the power to charge. Compare sections 2294, 2295.

LYNCHBURG NATIONAL BANK V. SCOTT BROS. AND OTHERS.*

Virginia Court of Appeals: At Wytheville.

(July 11, 1895.)

Absent: Buchanan, J.†

1. USURY—*Negotiable paper—bona fide holder for value—burden of proof.* Since the passage of the Act now embodied in Section 2818 of the Code, which declares that usurious contracts shall be deemed to be for an *illegal consideration*, as to the excess beyond the principal sum loaned or forborne, the plea of usury cannot be maintained in an action on negotiable paper in the hands of a *bona fide* holder for value. The only effect of such plea is to cast the burden of proof on the plaintiff to show that he is such holder, *bona fide* and for value; when he has shown this he is entitled to recover.

Writ of error to a judgment of the Circuit Court of Washington county, rendered October 10, 1894, in an action of debt wherein the

* Reported by M. P. Burks, State Reporter.

† Judge Buchanan was counsel in the court below.

plaintiff in error was the plaintiff and the defendants in error and the Bank of Abingdon were the defendants. *Reversed.*

The opinion states the case.

Honaker & Hutton and *White & Penn*, for the plaintiff in error.

Daniel Trigg, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This was an action at law instituted in the Circuit Court of Washington county, in December, 1893, by the Lynchburg National Bank against Scott Brothers, upon a negotiable note for \$1,000.00, bearing date June 3, 1893, executed by Scott Bros., and payable four months after date to S. L. Scott, at the Bank of Abingdon, Va., endorsed by S. L. Scott and the Bank of Abingdon, and discounted by the Lynchburg National Bank. The note sued on is the last of a series of renewals of a similar note discounted by the Bank of Abingdon, December 17, 1888, at an usurious rate of interest, the usurious interest paid said bank aggregating the sum of \$506.38. The plaintiff bank discounted the note sued on before maturity, in the due course of business, at six per cent. interest, without any notice of any fact connected with its history, or of any illegality which affected it in the hands of antecedent parties. Before the maturity of the note sued on, the Bank of Abingdon made a general deed of assignment for the benefit of all of its creditors. Among the defenses set up by the defendants, Scott Bros., was that of usury, and all questions of law and fact were, by agreement, submitted to the court, which gave judgment for the plaintiff for the sum of \$1,002.25, the principal of said note and charges of protest, subject to a credit of \$506.38, with interest on the balance from the date of said judgment. Objections to the rulings of the Circuit Court, adverse to the plaintiff, being regularly saved by bills of exceptions, application was made to this court for a writ of error, which was granted.

In the petition the plaintiff assigns four grounds of error, all raising questions of far more than ordinary interest. In the view, however, taken of the case by this court it becomes necessary to consider but one, and that is, Can the defendants, Scott Bros., in this action, avail themselves of the defense of usury against the plaintiff bank, a *bona fide* holder of the note sued on, for value and without notice of any taint of usury, and received in the due course of business, before maturity, and at a legal rate of discount?

The Statute of Virginia, Code, Section 2818, provides as follows: "All contracts and assurances, made directly or indirectly for the loan or forbearance of money, or other thing, at a greater rate of interest than is allowed by the preceding section, shall be deemed to be *for an illegal consideration*, as to the excess beyond the principal amount so loaned or forborne." This section of the Code is in the words of the Act as passed March 24, 1874, and has been the law in Virginia since that date. By the terms of the statute which was in force in this State prior to April 1, 1873, all contracts and assurances for the loan or forbearance of money founded upon an usurious consideration were declared to be *void*.

The question to be considered is the effect, as to negotiable instruments, of this change in the statute, declaring that such contracts shall be deemed to be for *an illegal consideration*, instead of *void*, as formerly.

These are not meaningless words, and it cannot be doubted that the legislature had some wise purpose in adopting the one, rather than the other, form of expression.

The purchaser or holder of a negotiable instrument who has taken it *bona fide*, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor, and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity as between the antecedent parties. 1 Daniel Neg. Inst., p. 576, sec. 769.

I believe the foregoing strong statement of the favor with which negotiable instruments are regarded by the law, is universally accepted as sound. So far as I have been able to examine the authorities, there is but one exception to the rule just laid down, and that is *when the statute renders such instruments void*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. The same author says: "When the statute merely declares, expressly or by implication, that the consideration *shall be deemed illegal*, the bill or note founded upon such consideration will be valid in the hands of the *bona fide* holder without notice, but the burden of proof will be upon the plaintiff, when the illegal consideration appears, to show that he is a *bona fide* holder without notice." In sections 807 and 808 the same author says: "In many localities negotiable instruments,

executed upon gaming or usurious considerations, are upon the same footing as those executed for other illegal considerations; that is, *void* between the parties, but valid in the hands of a *bona fide* holder;" and that "when the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving *bona fide* ownership for value, . . . and in all cases where the statute does not declare the instrument *void*, *bona fide* ownership for value being proved, the holder is entitled to recover."

Story on Promissory Notes, sec. 192, 3d edition, says: "The same doctrine will certainly apply to all cases of a *bona fide* holder for value without notice before it becomes due, where the original note, or the endorsement thereof, is founded on an illegal consideration, and this, upon the same general ground of public policy, is without any distinction between a case of illegality founded on moral crime or turpitude, which is *malum in se*, and a case founded on the positive prohibition of a statute, which is *malum prohibitum*; for, in each case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is, where the statute creating the prohibition has, at the same time, either expressly or by necessary implication, made the instrument absolutely *void* in the hands of every holder, whether he has such notice or not."

In note 4 to 3 Kent's Commentaries, 11th edition, p. 100, it is said: "If a note is not declared void by statute, mere illegality in its consideration will not affect the rights of a *bona fide* holder for value." Citing *Noriss v. Langley*, 19 N. H. 423; *Converse v. Foster*, 32 Vermont, 320; *Johnson v. Meeker*, 1 Wis. 436.

The principles in the foregoing text-books are sustained by the following adjudicated cases: *Glenn v. Bank*, 70 N. C. 191; *Paton v. Colt* (5 Mich. 505), reported in 72 Amer. Dec., p. 58; *Hay v. Ayling*, 16 Ad. & Ellis (side page) 423; *Vallet v. Parker*, 6 Wendell, 615; *Oats v. National Bank*, 100 U. S. 239, 249, 250; *Sondheim v. Gilbert* (117 Ind.), 10 Am. St. Rep. 28.

In the case of *Converse v. Foster*, 32 Vt. 828, cited in note 4 to Kent's Commentaries, *supra*, Judge Poland says: "The English statute against usury and gaming not only imposes a penalty for such illegal acts, but expressly declares that all notes, bills, bonds and other securities given for such illegal consideration shall be *utterly void*. All the cases that have been cited, and all that can be cited, so far as we

know, both English and American, upon this subject, turn upon this very distinction and difference between the statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, *void*, the defendant may insist on such illegality, though the plaintiff, or such other party between him and the defendant, took the bill or note, *bona fide*, and gave a valuable consideration for it. But, unless it has been so expressly declared by the legislature, illegality of consideration would be no defense to an action at the suit of a *bona fide* holder for value without notice of the illegality."

"If the statute declares a security void," says Judge Rodman, in the case of *Glenn v. Bank*, 70 N. C. 191, "then it is void in whomsoever's hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal by common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or one claiming through him.

"The case of *Hay v. Ayling*, above cited, is a notable illustration of the difference.

"Gaming securities were declared void by 9 Anne, chap. 14, sec. 1, and it was held that they were void in the hands of a *bona fide* innocent endorsee. The Act of 5th and 6th William, chap. 41, sec. 1, modified the act of Anne, and declared they should be illegal. The court held that, after that act, they could be recovered on by an innocent holder."

Mr. Justice Story, in the case of *Fleckner v. U. S. Bank*, 8 Wheat. 308, in delivering the unanimous opinion of the court, says: "The statutes of usury of the States, as well as of England, contain an express provision that usurious contracts shall be utterly void; and, without such an enactment, the contract would be valid, at least in respect to persons who are strangers to the usury."

In *Vallet v. Parker*, 6 Wendell, 615, Chief Justice Savage said: "Wherever the statute declares notes void, they are and must be so in the hands of every holder; but, where they are adjudged by the court to be so, for failure of, or the illegality of the consideration, they are void, in the hands of the original parties, or those who are chargeable with or have had notice of the consideration."

In *Sondheim v. Gilbert* (117 Ind. 71), 10 Am. St. Rep. 28, Mitchell, Judge, says: "The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, not-

withstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill or note, void. . . . But, *unless the legislature has so declared, then no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable.*" Citing a number of authorities.

This court in *Branch v. Commissioners of the Sinking Fund*, 80 Va. 427, says that a note in the hands of the maker, before delivery, is not property, nor the subject of ownership as such; that it must be issued, or delivered by the maker before any one can become the *bona fide* holder of it. This view is not in conflict with the position taken here, where the question being considered is the difference between contracts declared by the statute to be *void*, and those declared to be for an *illegal consideration*, and where the note sued on *was* issued and delivered by the maker. Nor are the authorities quoted to sustain the conclusion here reached in conflict with the view expressed in 80 Va. 427.

If the word *illegal* were construed to mean *void*, as contended for by the learned counsel for the appellees, the change in the statute would be meaningless. A glance at the history of the statute makes it clear that the legislature had an object in its change. The revisors of the Code of 1849 recommended that what is now section 2818 should be adopted by the legislature. The legislature, however, refused to adopt the report of the revisors, and the law still declared all usurious contracts *void*, until the law was modified, and declared that they should be *void* only as to the interest in excess of six *per cent. per annum*; but the legislature of 1874 declared that it should be deemed to be for an *illegal consideration* as to the excess beyond the principal sum loaned or forborne. Commercial paper has ever been regarded with favor by the law, and in view of its growing importance, and its universal convenience in the affairs of men, it is not strange that the law-maker, in the interest of wise public policy, should desire to exempt such paper, in the hands of a *bona fide* holder for value, and without notice, from the hazard and uncertainty to which it was subjected by the law, under a statute which declared the usurious contract *void*. But, whatever may have been the motive of the legislature in making this change, it is the duty of the court to enforce the law as it is made. And it is perfectly clear, upon reason and authority, that no matter

how *illegal* the consideration may be, a negotiable note in the hands of a *bona fide* holder for value without notice will be held valid and enforceable.

If the maker of a negotiable note contests the right of one who has acquired it by endorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be *void*.

The agreed statement of facts in this case shows that the plaintiff in error discounted the note sued on before maturity, and in the due course of business, at six *per cent.* interest; that the plaintiff in error had no notice or knowledge when it discounted the note that it was a renewal of any other note, or that it had ever theretofore been discounted by the Bank of Abingdon, or that any one had at any time received from the defendants in error usurious interest thereon.

The statute (sec. 2818) declaring that all usurious contracts shall be deemed to be for an *illegal consideration* as to the interest, instead of *void*, as formerly, it follows, from what has been said, that the defendants in error could not avail themselves of the defense of usury to defeat the plaintiff bank of its recovery of the note sued on, or any part thereof.

The judgment of the Circuit Court being in conflict with this opinion, it must be reversed and set aside, and this court will enter such judgment as the said Circuit Court ought to have entered.

NOTE BY ASSOCIATE EDITOR.—We are glad to know that the important question of the effect of usury on the rights of a *bona fide* holder of negotiable paper has been settled in Virginia. The conclusion of the court and the grounds upon which it is based seem to be incontrovertible. The identical question, save that it arose under the former statute declaring a contract *void* for usury, was adjudicated in the case of *Moffett v. Bickle*, 21 Gratt. 280, where it was held that the usury avoided the note even in the hands of a *bona fide* holder for value. Since the change in its language the statute has not before been the subject of judicial construction. The question was referred to by Burks, J., in *Moseley v. Brown*, 76 Va. 419, 424, but not being involved in the case was not decided. It may not be out of place, while referring to *Moseley v. Brown*, to say that the syllabus of that case is misleading. What the court in fact suggested as doubtful was, not whether there was restoration of the remedy to recover illegal interest paid, in the case of a negotiable note usurious in its inception, as indicated in the fourth paragraph of the syllabus, but whether usury might be pleaded against a note usurious in its inception, when *in the hands of a bona fide holder for value*.

The distinction made in the principal case between a note tainted with mere illegality (whether arising from statute or the common law) and one evidencing

a contract declared by statute to be *void*, when either is in the hands of a *bona fide* holder for value, seems to be a well-settled principle of the law merchant. It is noticed in the most elementary text-books on the subject. Prof. Bigelow in his excellent little work on Bills, Notes and Cheques (Students' Series) makes the same distinction (p. 203), as does also Prof. Norton in his recent work on Bills and Notes (West's Hornbook Series), p. 169.

Probably the only remaining instance in Virginia of negotiable paper being avoided in the hands of a *bona fide* holder for value, by reason of statutory illegality, is that of an instrument founded upon a gaming consideration. Section 2835 of the Code declares that "Every contract . . . of which the consideration, or any part thereof, is money, property, or other thing won or bet at any game, sport, pastime or wager, . . . shall be *void*." See opinion of Tucker, J., in *Woodson v. Barrett*, 2 H. & M. 80, 87-8, and cases cited. See also *Chapin v. Duke*, 57 Ill. 295 (11 Am. Rep. 15); *Snoddy v. Bank*, 88 Tenn. 573 (10 Am. St. Rep. 918 and note).

It is well to observe that although a bill or note be declared void by statute, so that the drawer or maker is discharged from liability to any subsequent holder, yet any person who endorses such paper to a *bona fide* holder for value is liable on his endorsement, notwithstanding the invalidity of the instrument; because by endorsing he represents that the paper is genuine, and warrants that it will be paid. *Moffett v. Bickle*, 21 Gratt. 280; *Edwards v. Dick*, 4 B. & A. 212.

So where the instrument is originally valid, but there is a statutory illegality of consideration in the subsequent transfer thereof (of a character to render the transfer void and not voidable only), no holder who must trace his title through such tainted endorsement, can, according to the weight of authority, recover against the maker or any prior endorser. If the endorsement is void, it must be treated as if it did not exist; and, if it does not exist, certainly it cannot operate to transfer title, as against any party above the tainted endorsement. See Randolph on Com. Paper, 559; Story on Prom. Notes, 193; Edwards on Bills and Notes, 493. *Contra*, Daniel on Neg. Instr. 760. See *Moffett v. Bickle*, *supra*, where the principle stated seems to have been tacitly recognized and enforced.

But statutory invalidity is not the only defence to negotiable paper in the hands of a *bona fide* holder for value, as suggested *obiter* by the learned court in its opinion in the principal case. The opinion itself recognizes want of delivery as such a defence. It may be not inappropriate in this connection to briefly notice some of the other defences of this character.

OTHER DEFENCES TO NEGOTIABLE PAPER IN THE HANDS OF BONA FIDE HOLDER FOR VALUE.—Defences which are not confined to immediate parties, but are equally applicable against *bona fide* holders for value, are variously termed by text-writers "legal," "absolute" or "real" defences, as distinguished from "equities," which are applicable only between immediate parties, or those who take with notice or without value. Besides the defence of statutory invalidity, discussed in the principal case, other instances of absolute or legal defences are:

(1) *Want of Delivery*. Where the instrument has never had life instilled into it by delivery (actual or constructive) the maker has made no contract whatsoever, and the defendants an absolute one. Examples of this are where one makes a note, which before delivery is stolen or forcibly taken from him; or where one obtains the signature of another (as from the fly-leaf of a book in his library)

without his consent, or with his consent for an innocent purpose, and fraudulently writes a negotiable instrument above it—though the latter is rather an instance of forgery than of non-delivery. In neither of these cases has the maker consented to be bound upon any contract whatsoever, to any person, for any purpose. There is in law, therefore, no contract which can be transferred. But negligence on the part of the maker, proximately and legally producing the result, may estop him from making the defence. What amounts to such negligence will be found discussed in the cases cited below. Cases such as these, of fraud in obtaining possession of the instrument, must be distinguished from those where the fraud is in the consideration only, where the defendant consents to be bound, and actually makes delivery, though induced indeed by a fraudulent representation. The latter case is that of a mere equity, and cannot be set up against a *bona fide* holder for value. *Burson v. Huntington*, 21 Mich. 415 (4 Am. Rep. 497); *Kellogg v. Steiner*, 29 Wis. 626; *Caulkins v. Whistler*, 29 Iowa, 495 (4 Am. Rep. 236); *Baxendale v. Bennett*, L. R. 3 Q. B. Div. 525; *Cline v. Guthrie*, 42 Ind. 227 (13 Am. Rep. 357); note to *Bedell v. Herring* (Cal.) 11 Am. St. Rep. at p. 313, where the authorities are collected, and the few cases *contra* criticised as of doubtful correctness; *Willard v. Nelson* (Neb.), 37 Am. St. Rep. 455, and note p. 458-459; *Howe v. Ould & Carrington*, 28 Gratt. 1; *Branch v. Commissioners*, 80 Va. 427; *Chapman v. Rose*, 56 N. Y. 137 (15 Am. Rep. 401); Bigelow on Bills, Notes and Ch. (Students' Series) 174-178.

It would seem, however, on principle, that where the instrument has once been delivered and has thereby become a subsisting obligation, if the maker should afterwards become repossessed of it by purchase or otherwise before maturity, and it should then be stolen from him, he would be bound to a *bona fide* holder for value who purchased before maturity. If so, the case of *Branch v. Commissioners*, 80 Va. 427, can hardly be sustained on the ground upon which the opinion is based.

(2) *Fraud in Esse Contractus*. Fraud in the execution of the contract, by which consent or union of minds in the supposed contract is prevented, is another absolute defence, closely akin to want of delivery. It must be carefully distinguished from fraud touching the inducement to or the desirability of the contract, which is an equity only and not available against a *bona fide* holder for value. An illustration of the former kind, constituting an absolute defence, is presented where the maker is induced by a misrepresentation, or by a trick or device, to sign and deliver what is really negotiable paper, when in fact he thinks he is signing something of a wholly different character. Here, again, negligence of the maker, operating not only as the occasion, but as the proximate cause of the paper getting into circulation, may cut off the defence. This defence is commonly invoked by blind, ignorant, weak-minded or illiterate persons; and in general the difficulty in such cases is rather with the degree of negligence which the case presents than with the principle that, in the absence of negligence, the defence is permissible. *Foster v. McKinnon*, L. R. 4 C. P. 704; *Arnold v. Cheque Bank*, 1 C. P. Div. 578; *Douglas v. Matting*, 29 Iowa, 598 (4 Am. Rep. 238); *Taylor v. Atchison*, 54 Ill. 196 (5 Am. Rep. 118); *Walker v. Ebert*, 29 Wis. 194 (9 Am. Rep. 548 and note); note to *Bedell v. Herring* (Cal.), 11 Am. St. Rep. at pp. 317-321—the case of *Bedell v. Herring* itself seems to be *contra*; *Willard v. Nelson*, 35 Neb. 351, and note thereto in 37 Am. St. Rep. 458-460; Bigelow on Bills, Notes and Ch. (Students' Series), 179.

(3) *Alteration and Forgery.* A material and unauthorized alteration of a negotiable instrument, intentionally made by one a party to it or in lawful possession of it, after its delivery as a completed instrument, destroys its validity against the maker, even in the hands of a *bona fide* holder for value. The reason is that the altered instrument does not represent the maker's contract, and the identity of the instrument which does has been destroyed. *Draper v. Ward*, 112 Mass. 315; *Angle v. Northw. Life Ins. Co.* 92 U. S. 330; *Woodworth v. Bank of N. America*, 19 Johns. 391, and extensive note to that case in 10 Am. Dec. 267; *Fordyce v. Kosminski*, 49 Ark. 40 (4 Am. St. Rep. 18 and note); Bigelow on Bills, N. and Ch. 181. See *Dobyns v. Rawley*, 76 Va. 537, 544; *Batchelder v. White*, 80 Va. 103. And the disposition of the courts is to recede from the former doctrine that where the maker has facilitated the alteration by leaving blank spaces in an instrument, delivered as complete, he will be estopped to defend on the ground of alteration, and must himself bear the loss. This idea seems to have originated in a misconception of the English case of *Young v. Grote*, 4 Bing. 253, which may be distinguished as involving something of agency in the facts. Thus in *Holmes v. Trumper*, 22 Mich. 427 (7 Am. Rep. 661), the note closed with the words "with interest at" followed by a blank space. The holder fraudulently filled in the blank space with the words "ten per cent.," and transferred the paper to a *bona fide* purchaser for value. The court held that the alteration avoided the note. "Whenever," says Christianity, J., "a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and, unless perhaps when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders. If promissory notes were only given by first-class business men who are skilled in drawing them up in the best possible manner to prevent forgery, it might be well to adopt a high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of people, who are not thus skillful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper." A similar view is taken, after a full review of the authorities, in *Greenfield Bank v. Stowell*, 123 Mass. 198 (25 Am. Rep. 67), and in *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 264 (33 Am. Rep. 129), and in the recent English case of *Schofield v. Earl of Londesborough*, 11 L. T. R. 149 (Dec. 1894). The same conclusion is reached in *Fordyce v. Kosminski*, 49 Ark. 40 (reported also in 4 Am. St. Rep. 18, with notes, in which the cases *pro* and *con* are collected). Prof. Bigelow, in his work heretofore cited (p. 194), says: "It has been well questioned whether the leaving of blanks can ordinarily amount to negligence at all, not to say negligence the legal cause of the loss, for it is impracticable to execute an instrument without leaving blanks somewhere. There must be a blank at the beginning or at the end, unless, what not

the most careful man does, a line is drawn before the first word and after the last clean to the signature. Universal practice cannot be negligence." See 38 Cent. L. J. 90.

The subject of forgery is discussed at length, with especial reference to checks, in note to *Peoples Bank v. Franklin Bank* (Tenn.), 17 Am. St. Rep. 889-899.

(4) *Incapacity—Corporations.* Incapacity to contract, whether legal or natural, is a defence in all cases in favor of the incompetent party. Infancy, coverture and (probably) insanity are valid absolute defences to negotiable paper. Bigelow on Bills, Notes and Cheques (Students' Series), 200-201; 1 Min. Inst. (4th ed.) 512-513; monographic note on infants' contracts, in 18 Am. St. Rep. at p. 643 and following; *Carrier v. Sears*, 4 Allen, 336 (insanity).

Where a corporation inherently lacks the power to issue negotiable paper of the kind under consideration, under any circumstances, such paper will be void in the hands of a *bona fide* holder for value. It is otherwise, as a general rule, where there is merely an irregular exercise of the power, not apparent from the face of the instrument. See 4 Thompson Corp. sec. 5737 *et seq*; 1 Dillon Munic. Corp. 513 *et seq*; *Northern Bank v. Porter*, 110 U. S. 608; *Nesbitt v. Riverside*, 144 U. S. 610. And any one who takes negotiable paper made or endorsed by a corporation, must at his peril see that the person assuming to act for the corporation has authority (express or implied) for the purpose. 2 Morawetz Corp. 606; *Davis v. Rockingham Investment Co.* 89 Va., 290. W. M. L.

NORFOLK & WESTERN RAILROAD COMPANY V. JOHNSON.*

Virginia Court of Appeals: At Wytheville.

(July 11, 1895.)

1. RAILROADS—*Fencing roadbeds—killing stock—negligence.* A railroad company which has not complied with the provisions of section 1258 of the Code relating to fencing its road-bed, is liable to the owner of the land for the value of his stock killed by its engines and cars within the boundaries required to be fenced, though such stock was not killed by the negligence of the company in the management and running of its engines and trains. *McGavock s Adm'r v. Norfolk & Western R. R.*, 90 Va. 507, *approved*.

Writ of error to a judgment of the Circuit Court of Washington county, rendered October 9, 1894, in an action of trespass on the case, wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Affirmed.*

The opinion states the case.

Fulkerson, Page & Hurt, for the plaintiff in error.

Daniel Trigg and Jno. W. Price, for the defendant in error.

*Reported by M. P. Burks, State Reporter.